

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAVIER MENDOZA,
Defendant.

No. CR-04-2056-FVS

ORDER

THIS MATTER comes before the Court based upon the defendant's motion to vacate the judgment. He is representing himself. The government is represented by Assistant United States Attorney Earl A. Hicks.

BACKGROUND

On August 11, 2004, the government filed a "Third Superseding Indictment." The defendant was named in Count 1 (conspiracy), Counts 2 and 3 (distribution of methamphetamine), and Count 4 (possession with intent to distribute methamphetamine). On October 26, 2004, the government filed an "Information to Establish Prior Conviction." The Information alleged the existence of two prior felony drug offenses. The Information further alleged that, given these convictions, the defendant faced a mandatory sentence of life imprisonment. On November 8, 2004, the defendant pleaded guilty to Count 1 (conspiracy) and Count 4 (possession with intent to distribute methamphetamine).

1 The Plea Agreement contains a lengthy recitation of the facts admitted
2 by the defendant. *Id.* at 5-12. The defendant was sentenced to a term
3 of 20 years imprisonment on March 9, 2005. The judgment was entered
4 on March 14, 2005. The defendant did not appeal. Thus, the judgment
5 became final on March 28th. See Fed.R.App.P. 4(b)(1)(A)(i) (the
6 defendant must file a notice of appeal within ten days of entry of
7 judgment); Fed.R.App.P. 26(a)(2) (intermediate Saturdays and Sundays
8 are excluded from the computation of a deadline when the period is
9 less than eleven days). On March 27, 2006, the defendant filed a
10 motion to vacate pursuant to 28 U.S.C. § 2255.

11 JURISDICTION AND VENUE

12 The defendant claims counsel was ineffective because he failed to
13 argue that the Court lacked jurisdiction and that venue was improper.
14 He is mistaken. To begin with, since he was charged with violations
15 of federal law, the Court had jurisdiction. 18 U.S.C. § 3231
16 ("district courts of the United States shall have original
17 jurisdiction . . . of all offenses against the laws of the United
18 States"). Furthermore, since he both delivered and possessed
19 methamphetamine within the Eastern District of Washington, venue was
20 proper. Fed.R.Crim.P. 18 ("the prosecution shall be had in a district
21 in which the offense was committed"). See also 18 U.S.C. § 3232
22 (venue governed by Rule 18).¹
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24
25 ¹By pleading guilty, he arguably waived any objection to
26 being prosecuted in this district. See *United States v. Reyes-Platero*, 224 F.3d 1112, 1114-15 (9th Cir.2000), *cert. denied*, 531 U.S. 1117, 121 S.Ct. 868, 148 L.Ed.2d 780 (2001). In any event,

GOVERNMENT'S DECISION TO ABANDON CONSPIRACY COUNT

At the pretrial conference on October 8, 2004, the government noted that some of the defendant's codefendants had pleaded guilty. (Verbatim Report of Proceedings, at 9.) The government announced that, if the defendant proceeded to trial, it would abandon the conspiracy charge and focus on the remaining charges against him. *Id.* The defendant alleges his attorney did not inform him of the government's intentions before he pleaded guilty to the conspiracy charge. It is unclear whether he is correct. However, even if he is, he was on notice of the government's intentions. Not only was he present at the pretrial conference that was held on October 8, 2004, but also he was present at another pretrial conference that was held on October 28, 2004. Once again, the government reiterated its intentions; advising all present that it intended to seek dismissal of the conspiracy charge on the first day of trial. (Minute Entry for October 28, 2004.)

ADEQUACY OF INVESTIGATION

The defendant claims his attorney failed to conduct an adequate investigation with respect to whether he participated in the conspiracy alleged in Count 1. The defendant insists that, had his attorney informed him of the weakness of the government's conspiracy charge, he would have rejected the plea agreement and gone to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985) (habeas petitioner must establish by a reasonable

he now concedes that venue was proper.

1 probability that he would have exercised his right to trial by jury
2 but for his attorney's alleged errors).

3 Perhaps the defendant is correct in asserting he would have gone
4 to trial; but he is not entitled to habeas relief based upon his
5 attorney's alleged failure to conduct an adequate investigation. As
6 explained above, the government would have sought dismissal of Count 1
7 had the defendant rejected the plea agreement. It is Counts 2-4 that
8 the government would have litigated.

9 Count 2 allegedly occurred on October 8, 2003. The government
10 was prepared to offer evidence that the defendant delivered 111 grams
11 of a substance containing methamphetamine (57.8 grams of pure
12 methamphetamine). (Plea Agreement, at 6.) Count 3 allegedly occurred
13 on October 29, 2003. The government was prepared to offer evidence
14 that he delivered 113 grams of a substance containing methamphetamine
15 (52.2 grams of pure methamphetamine). *Id.* Count 4 occurred on March
16 2, 2004. The government was prepared to offer evidence that, at the
17 time of his arrest, the defendant was carrying 440 grams of a
18 substance containing methamphetamine (317 grams of pure
19 methamphetamine). *Id.* at 9.²

20
21 The defendant acknowledges that the government could have
22 presented convincing evidence in support of each count. *See Eggleston*
23 *v. United States*, 798 F.2d 374, 376 (9th Cir.1986) (the strength of
24 government's case must be considered in assessing an inadequate-
25

26 ²An additional quantity of methamphetamine was located in a
nearby motel room. (Plea Agreement, at 9.)

1 investigation claim). Thus, had the defendant gone to trial, he
2 likely would have been convicted on one or more of the remaining
3 counts. A conviction would have had profound consequences given the
4 defendant's two prior felony drug offenses. In all probability, the
5 Court would have sentenced him to imprisonment for life. 18 U.S.C. §
6 841(b)(1)(A)(viii).

7 Both the defendant and his attorney were aware of this
8 contingency. (Plea Agreement, ¶ 11, at 15.) Against this backdrop,
9 there is no reason to think the defendant's attorney would have
10 offered different advice had he conducted a more thorough
11 investigation with respect to the defendant's participation in the
12 conspiracy. See *Lambert v. Blodgett*, 393 F.3d 943, 982 (9th Cir.2004)
13 ("Where the alleged error is counsel's failure to investigate a
14 potential defense, the salient inquiry is whether 'discovery of the
15 evidence would have led counsel to change his recommendation as to the
16 plea.'" (quoting *Hill*, 474 U.S. at 59, 106 S.Ct. at 370)).

17 The defendant's attorney knew that the government was going to
18 seek dismissal of the conspiracy charge if the defendant rejected the
19 plea agreement. Consequently, it was not Count 1, but Counts 2-4,
20 that posed a risk for the defendant; and a grave risk it was. Fully
21 appreciating the gravity of the risk, the defendant's attorney entered
22 into negotiations with the government. He was able to secure
23 significant concessions. In exchange for the defendant's pleas of
24 guilty to Counts 1 and 4, the government agreed to give up any effort
25 to seek a sentence of life imprisonment. It is difficult to overstate
26

1 the value of this concession. In all probability, it enabled the
2 defendant to avoid a sentence of life imprisonment.

3 **LOYALTY OF ATTORNEY**

4 The defendant alleges that his attorney acted disloyally and
5 contrary to his interests by advising him to plead guilty to the
6 conspiracy charge despite the fact the government did not intend to
7 pursue the charge if he proceeded to trial. He is mistaken. As
8 explained in the preceding section, his attorney obtained a valuable
9 concession from the government in exchange for his agreement to plead
10 guilty to the conspiracy charge.

11 **DEFENDANT SUFFERED NO PREJUDICE FROM BLAKELY WAIVER**

12 At the time the defendant's plea agreement was being negotiated,
13 the Supreme Court had decided *Blakely v. Washington*, 542 U.S. 296, 124
14 S.Ct. 2531, 159 L.Ed.2d 403 (2004), but not *United States v. Booker*,
15 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Given the
16 uncertainty that existed at the time, the government insisted upon
17 adding a section entitled "*Blakely* Waiver." (Plea Agreement, at 32.).
18 The defendant claims his attorney should have objected to this
19 provision. He is mistaken. During plea negotiations, the government
20 properly may demand that the defendant waive a constitutional or
21 statutory right as part of the plea agreement as long as the defendant
22 is free to reject the government's demand. *United States v. Navarro-*
23 *Botello*, 912 F.3d 318, 321-22 (9th Cir. 1990). Furthermore, a
24 defendant suffers no prejudice from entering into a plea agreement
25 that requires him to waive a right where the agreement substantially
26

1 reduces the sentence that he likely would have received had he been
2 convicted by a jury. *Cf. United States v. Baramdyka*, 95 F.3d 840,
3 842-43, 847 (9th Cir.1996) (waiver of right to appeal), *cert. denied*,
4 520 U.S. 1132, 117 S.Ct. 1282, 137 L.Ed.2d 357 (1997).

5 **ABSENCE OF MUTUAL MISTAKE**

6 The defendant argues that, during plea negotiations, both he and
7 the government were operating under the assumption that the Sentencing
8 Guidelines were binding. He argues that this was a mutual mistake of
9 law that renders his conviction and sentence voidable. He is
10 mistaken. To begin with, the defense of mutual mistake is not
11 available to the defendant. *United States v. Transfiguracion*, 442
12 F.3d 1222, 1229-30 (9th Cir.2006). Besides, even if it was, there is
13 no reason to think the defendant would have gone to trial had he known
14 the Sentencing Guidelines were advisory. It was not the Guidelines,
15 but 21 U.S.C. § 841(b)(1)(A)(viii), that likely would have required
16 the Court to sentence him to life imprisonment had he gone to trial
17 and the jury convicted him of either Count 2, Count 3, or Count 4.

18 **IT IS HEREBY ORDERED:**

19 The defendant's motion to vacate (**Ct. Rec. 76**) is denied.

20 **IT IS SO ORDERED.** The District Court Executive is hereby
21 directed to enter this order and furnish copies to the defendant and
22 to counsel for the government.
23

24 **DATED** this 8th day of February, 2007.

25 s/ Fred Van Sickle
26 Fred Van Sickle
United States District Judge